

SERVICE DATE - LATE RELEASE JUNE 9, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34342

KANSAS CITY SOUTHERN — CONTROL —
THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
GATEWAY EASTERN RAILWAY COMPANY,
AND
THE TEXAS MEXICAN RAILWAY COMPANY

Decision No. 2

AGENCY: Surface Transportation Board, DOT.

ACTION: Decision No. 2 in STB Finance Docket No. 34342; Notice of Acceptance of Railroad Control Application; Issuance of Procedural Schedule.

SUMMARY: The Surface Transportation Board (Board) is accepting for consideration the KCS-3/TM-3 railroad control application (referred to as the KCS/TM application) filed May 14, 2003, by Kansas City Southern (KCS), The Kansas City Southern Railway Company (KCSR), Gateway Eastern Railway Company (GWER), The Texas Mexican Railway Company (Tex Mex or TM), and Mexrail, Inc. (Mexrail).¹ The KCS/TM application seeks Board approval and authorization under 49 U.S.C. 11321-26 for KCS, which already controls KCSR and GWER, to acquire control of Tex Mex. The Board finds that the transaction proposed in the KCS/TM application is a “minor transaction” under 49 CFR 1180.2(c), although the applicants are subject to the expanded and enhanced requirements discussed herein.

The Board has considered applicants’ petition to establish a procedural schedule, also filed May 14, 2003. With a modification to reflect that the KCS/TM application was filed on May 14, 2003, and with further modifications principally intended to allow time for a public hearing and to allow interested parties additional time to file comments, the Board is adopting applicants’ proposed procedural schedule, as modified. This will allow the Board to issue a

¹ KCS, KCSR, GWER, Tex Mex, and Mexrail are referred to collectively as “applicants.” The application does not list Mexrail as an applicant, but Mexrail clearly is a party to the transaction. Consistent with our practice, we will treat Mexrail as an applicant. See, e.g., Union Pacific/Southern Pacific Merger, 1 S.T.B. 233, 241 n.3 (1996); CSX Corp. et al. — Control — Conrail Inc. et al., 3 S.T.B. 196, 207 n.3 (1998).

decision 45 days after the close of the record and 24 days prior to the statutory deadline, assuming that no unanticipated environmental review is required and that no oral argument is held.

DATES: The effective date of this decision is **June 13, 2003**. Applicants must submit their Environmental Appendix and Safety Integration Plan (SIP) to the Board, and must supplement their application in the manner indicated below, by **June 23, 2003**. Any person who wishes to participate in this proceeding as a party of record (POR) must file, no later than **June 27, 2003**, a notice of intent to participate. Applicants must distribute their Environmental Appendix and SIP to parties of record and other designated entities, and must initiate publication of newspaper notices, by **July 1, 2003**. A public hearing will be held in late **July 2003**; the precise date and the location will be announced later. All comments on applicants' Environmental Appendix and SIP must be filed by **July 31, 2003**. All comments, protests, requests for conditions, and any other evidence and argument in opposition to the KCS/TM application, including filings by the U.S. Department of Justice (DOJ) and the U.S. Department of Transportation (DOT), must be filed by **August 4, 2003**. Responses to comments, protests, requests for conditions, and other opposition, responses to comments of DOJ and DOT, and rebuttal in support of the KCS/TM application must be filed by **September 2, 2003**. For further information respecting dates, see Appendix A (Procedural Schedule).

ADDRESSES: Send an original and 25 copies of all pleadings referring to STB Finance Docket No. 34342 to: Surface Transportation Board, 1925 K Street, N.W., Washington, DC 20423-0001.² In addition, one copy of all documents in this proceeding must be sent to: (1) Secretary of the United States Department of Transportation, 400 Seventh Street, S.W., Washington, DC 20590; (2) Attorney General of the United States, c/o Assistant Attorney General, Antitrust Division, Room 3645, Department of Justice, Washington, DC 20530; (3) William A. Mullins, Esq., TROUTMAN SANDERS LLP, 401 Ninth Street, N.W., Suite 1000, Washington, DC 20004-2134; and (4) Richard H. Streeter, Esq., BARNES & THORNBURG, 750 Seventeenth Street, N.W., Suite 900, Washington, DC 20006.

In addition to submitting an original and 25 copies of all paper documents filed with the Board, parties also must submit, on 3.5-inch IBM-compatible floppy diskettes (disks) or compact discs (CDs), copies of all textual materials, electronic workpapers, data bases, and spreadsheets

² For a document to be considered a formal filing, the Board must receive an original and 25 copies of the document, which must show that it has been properly served. Documents transmitted by facsimile (FAX) will not be considered formal filings and are not encouraged because they will result in unnecessarily burdensome, duplicative processing. In addition, each formal filing must be accompanied by an electronic submission per the Board's requirements as discussed in detail in this decision.

used to develop quantitative evidence. Textual materials must be in, or compatible with, WordPerfect 10.0. Electronic spreadsheets must be in, or compatible with, Lotus 1-2-3 Release 9 or Microsoft Excel 2002. A copy of each disk or CD submitted to the Board should be provided to any other party upon request. Further details are discussed below.

FOR FURTHER INFORMATION CONTACT: Julia M. Farr, (202) 565-1655. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.]

SUPPLEMENTARY INFORMATION: The KCS/TM common control for which applicants seek approval in the KCS/TM application involves the acquisition by KCS of control of Tex Mex.

Kansas City Southern. KCS, a noncarrier holding company, currently controls two rail carriers: KCSR and GWER.

The Kansas City Southern Railway Company. KCSR, a Class I railroad,³ is a wholly owned direct subsidiary of KCS. KCSR owns and operates approximately 3,100 miles of main and branch lines in 10 midwestern and southern states (Kansas, Missouri, Illinois, Oklahoma, Arkansas, Tennessee, Texas, Louisiana, Mississippi, and Alabama). KCSR's principal routes extend from Kansas City, MO, via Shreveport, LA, to Beaumont/Port Arthur, TX, Lake Charles, LA, and New Orleans, LA. KCSR also has a route extending from Dallas, TX, via Shreveport, LA, to Meridian, MS, and a branch line route extending north out of Alexandria, LA, to Hope, AR. KCSR's major terminals are: Kansas City and St. Louis, MO; Shreveport, Lake Charles, Baton Rouge, and New Orleans, LA; Beaumont, Port Arthur, and Dallas, TX; and Vicksburg, Jackson, Meridian, and Gulfport, MS. KCSR also provides service, via haulage rights, over 1,200 miles of lines of other railroads, most prominently over lines of Union Pacific Railroad Company (UP) between Springfield and Chicago, IL, between Omaha, NE/Council Bluffs, IA, Lincoln, NE, Topeka and Atchison, KS, and Kansas City, MO, and between Beaumont and Houston/Galveston, TX, and over lines of The Burlington Northern and Santa Fe Railway Company (BNSF) between Kansas City, MO, and Council Bluffs, IA. KCSR also owns a non-controlling 16.6% interest in the Kansas City Terminal Railway Company and a

³ The Board's regulations divide railroads into three classes based on annual carrier operating revenues. Class I railroads are those with annual carrier operating revenues of \$250 million or more (in 1991 dollars); Class II railroads are those with annual carrier operating revenues of more than \$20 million but less than \$250 million (in 1991 dollars); and Class III railroads are those with annual carrier operating revenues of \$20 million or less (in 1991 dollars). See 49 CFR Part 1201, General Instruction 1-1(a).

non-controlling 50% interest in the Kansas City Joint Agency, both of which are located in Kansas City, MO.

Gateway Eastern Railway Company. GWER, a Class III railroad, is a wholly owned direct subsidiary of KCSR. GWER owns and operates approximately 17 miles of rail lines between East Alton, IL, and East St. Louis, IL. GWER also operates via trackage rights over 5 miles of Terminal Railroad Association of St. Louis track between WR Tower and Willows Tower, IL, and over 11.07 miles of The Alton and Southern Railway Company track between Lenox Tower and Rose Lake, IL. See KCS-3 at 217. GWER is primarily engaged in industrial switching in the Alton and Wood River, IL areas.

The Texas Mexican Railway Company. Tex Mex, a Class II railroad, is a wholly owned direct subsidiary of Mexrail. Tex Mex owns and operates 157 miles of rail line between Laredo and Corpus Christi, TX. Pursuant to a 1996 Board order, see Union Pacific/Southern Pacific Merger, 1 S.T.B. at 421-26, Tex Mex also operates via trackage rights over approximately 379 miles of UP lines between Robstown and Beaumont, TX, via Placedo, Victoria, Flatonia, Rosenberg, and Houston, TX. Tex Mex interchanges with KCSR at Beaumont, TX; with The Houston Belt & Terminal Railway Company and The Port Terminal Railway Association at Houston, TX; with BNSF at Corpus Christi, Houston, and Robstown, TX; with UP at Corpus Christi, Houston, Laredo, Robstown, and Victoria, TX; and with TFM, S.A. de C.V. (TFM), on the International Rail Bridge that spans the Rio Grande River between Laredo, TX, and Nuevo Laredo, Tamaulipas, Mexico.⁴

Mexrail. Prior to May 9, 2003, Mexrail, a noncarrier, was a wholly owned direct subsidiary of TFM. Mexrail owns two assets: (1) 100% of the shares of Tex Mex; and (2) 100% of the U.S. portion of the bridge structure (but not the track, which is owned by Tex Mex, see KCS-3 at 220) of the International Rail Bridge that runs between Laredo (on the U.S. side of the border) and Nuevo Laredo (on the Mexican side of the border).⁵

⁴ Over 50% of all rail freight interchanged between the U.S. and Mexico passes over the International Rail Bridge at Laredo.

⁵ Applicants advise that Mexrail has been treated as a noncarrier since its creation, and that they are aware of only one instance in which there has ever been even so much as a suggestion that Mexrail is a carrier. The one instance they cite, see KCS-3 at 19 n.12, was a “passing statement” by the Board that “Mexrail is a carrier.” See Mexrail, Inc. v. Union Pacific Railroad Company and Missouri Pacific Railroad Company, STB Finance Docket No. 32980 (Mexrail) (STB served July 13, 2000), slip op. at 5 n.9 (whereas Tex Mex owns the track on the U.S. half of the bridge, Mexrail owns the underlying “superstructure” of the bridge). Under these
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TFM. TFM, a railroad located entirely in Mexico, operates from Nuevo Laredo south to Monterrey, San Luis Potosi, Querataro, and Mexico City, and, from the Querataro-Mexico City area, west to Lazero Cardenas and east to Veracruz. TFM owns no U.S. property and does not operate in the U.S.⁶ (1) TFM, which (prior to May 9, 2003) held a 100% ownership interest in Mexrail, is owned by Grupo Transportación Ferroviaria Mexicana, S.A. de C.V. (Grupo TFM, which owns an 80% interest in TFM) and the Mexican Federal Government (which owns a 20% interest in TFM).⁷ (2) Grupo TFM is owned by NAFTA Rail, S.A. de C.V. (“NAFTA Rail #1,” which owns a 36.9% interest in Grupo TFM), TMM Multimodal (which owns a 38.5% interest in Grupo TFM), and TFM (which holds a 24.6% interest, with limited voting rights, in Grupo TFM, its 80% parent). (3) NAFTA Rail #1 is a wholly owned indirect subsidiary of KCS.⁸ (4) TMM Multimodal is a 96.3%-owned direct

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circumstances, applicants are justified in treating Mexrail as a noncarrier (and they are therefore justified in not seeking authority for KCS to control Mexrail).

⁶ TFM connects, on the International Rail Bridge that runs between Laredo and Nuevo Laredo, with two U.S. railroads: Tex Mex and UP. Traffic is interchanged, at the middle of the Bridge, between TFM, on the Mexican side, and Tex Mex and UP, on the U.S. side. See KCS-3 at 221.

⁷ Applicants have advised that Grupo TFM’s owners are under an obligation to acquire the Mexican Government’s 20% interest in TFM in 2003 unless the Mexican Government “prior to that date sells shares in a public offering.” KCS-3 at 12 n.4.

⁸ Two points respecting the indirect interest that KCS holds in Grupo TFM are addressed in this footnote. (1) Applicants have indicated that NAFTA Rail #1 is a wholly owned indirect subsidiary not only of KCS but also of KCSR, which (as has already been noted) is itself a wholly owned direct subsidiary of KCS. See KCS-3 at 13. If NAFTA Rail #1 were owned by KCS in a single corporate chain that ran through KCSR, NAFTA Rail #1 would indeed be a wholly owned indirect subsidiary of both KCS and KCSR. Applicants have also indicated, however, that NAFTA Rail #1 is owned by KCS via two corporate chains, only one of which runs through KCSR. See KCS-3 at 13. The two claims (the claim that NAFTA Rail #1 is a wholly owned indirect subsidiary of KCSR, and the claim that NAFTA Rail #1 is owned by KCS via two corporate chains, only one of which runs through KCSR) cannot both be true. (2) Applicants have indicated that KCS currently owns “an approximate 47% stake” in Grupo TFM. See KCS-3 at 12. See also KCS-3 at 55 n.1 (applicants indicate that Grupo TFM is “effectively owned” 46.5% by KCS) and KCS-3 at 73 (applicants indicate that KCS has “an economic interest” in Grupo TFM of approximately 46.5%). It is not clear how this calculation was derived. It may, perhaps, have been derived by dividing 36.9% (the interest in Grupo TFM

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subsidiary of TMM Holdings, S.A. de C.V., which is itself a wholly owned direct subsidiary of Grupo TMM, S.A. (Grupo TMM, a noncarrier).⁹

Two Transactions: KCS/TM and KCS/TFM. On April 21, 2003, KCS and Grupo TMM announced a series of agreements that contemplate two “separate” transactions, which are referred to as the KCS/TM transaction (this transaction contemplates the acquisition, by KCS, of control of Tex Mex) and the KCS/TFM transaction (this transaction contemplates the acquisition, by KCS, of control of TFM). Neither of these two transactions is contingent upon the other. The KCS/TM transaction has been submitted to the Board for regulatory approval, and is the subject of this decision. The KCS/TFM transaction has not been, and will not be, submitted to the Board for regulatory approval. If these two transactions are consummated, KCS — which, as part of the KCS/TFM transaction, will change its name to “NAFTA Rail” (referred to as NAFTA Rail #2)¹⁰ — will control, directly or through one or more corporate intermediaries, four railroads (KCSR, GWER, Tex Mex, and TFM), all of which will be operated as separate subsidiaries under common control.

The KCS/TM Transaction; Purchase Price; Voting Trust. One of the agreements announced on April 21, 2003 (referred to as the KCS/TM Stock Purchase Agreement) contemplated the acquisition by KCS, from TFM, of 51% of TFM’s 100% interest in Mexrail, in exchange for approximately \$32.7 million in cash. On May 9, 2003, KCS consummated the acquisition (the purchase price was apparently paid on May 9th) and acquired a 51% interest in Mexrail.¹¹ KCS advises that, to avoid any violation of 49 U.S.C. 11323 et seq., it immediately

⁸(...continued)
held by KCS through intermediaries) by the sum of 36.9% and 38.5% (the interests in Grupo TFM not held by Grupo TFM’s 80%-owned subsidiary), which would yield approximately 48.9%.

⁹ Although applicants generally refer to Grupo TMM, S.A., as “TMM,” see KCS-3 at 8, this decision refers to Grupo TMM, S.A., as “Grupo TMM,” to avoid confusion (by using a consistent naming practice that reflects the fact that each “Grupo” entity sits at the top of its respective corporate chain, see KCS-3 at 13).

¹⁰ The new “NAFTA Rail” (i.e., the renamed Kansas City Southern referred to as NAFTA Rail #2) should be distinguished from the old “NAFTA Rail” (“NAFTA Rail, S.A. de C.V.,” the wholly owned indirect subsidiary of KCS that is referred to as NAFTA Rail #1).

¹¹ Although KCS has already purchased 51% of TFM’s 100% interest in Mexrail, KCS also has a call on the remaining 49% of TFM’s 100% interest in Mexrail. This call apparently
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placed the shares of Mexrail and Tex Mex (i.e., KCS's 51% interest in Mexrail, and Mexrail's 100% interest in Tex Mex), see KCS-3 at 19 n.12, into an independent irrevocable voting trust that was established pursuant to an agreement (referred to as the KCS/TM Voting Trust Agreement) that, KCS claims, is consistent with 49 CFR part 1013. KCS advises that, if and when the Board approves the acquisition by KCS of control of Tex Mex, the voting trust will be dissolved, KCS will take full ownership of its 51% interest in Mexrail, and Mexrail will reassume full ownership of its 100% interest in Tex Mex.¹²

The KCS/TFM Transaction; Purchase Price; Several Contingencies. Two or more of the agreements announced on April 21, 2003, contemplate the acquisition by KCS of control of TFM. The KCS/TFM transaction envisioned by these agreements contemplates that Kansas City Southern will be renamed "NAFTA Rail" (referred to as NAFTA Rail #2); that NAFTA Rail #2 will acquire TMM Multimodal's 38.5% interest in Grupo TFM, which, when combined with NAFTA Rail #2's (i.e., KCS's) present 36.9% interest, will give NAFTA Rail #2 a controlling interest in Grupo TFM, and, therefore, a controlling interest in TFM;¹³ and that TMM Multimodal will receive 18 million shares of NAFTA Rail #2 representing an approximately 22% (20% voting, 2% subject to voting restrictions) interest in NAFTA Rail #2, plus \$200 million in cash and a potential incentive payment of between \$100 million and \$180 million based on the resolution of certain contingencies.¹⁴ The KCS/TFM transaction, including the change of name from Kansas City Southern to NAFTA Rail, is contingent upon obtaining adequate financing, the approval of the shareholders of KCS, the approval of the shareholders of Grupo TMM, the Hart-Scott-Rodino process at the U.S. Department of Justice (DOJ), the approval of the Mexican Competition Commission, and the approval of the Mexican Foreign Investment Commission.¹⁵

¹¹(...continued)
allows KCS to purchase the remaining 49% interest. See KCS-3 at 14.

¹² The KCS/TM transaction (i.e., the acquisition, by KCS, of a 51% interest in Tex Mex) is subject to the jurisdiction of the Board under § 11323(a)(5) ("Acquisition of control of a rail carrier by a person that is not a rail carrier but that controls any number of rail carriers.").

¹³ The KCS/TM application does not appear to state explicitly that NAFTA Rail #2 will acquire all of TMM Multimodal's 38.5% interest in Grupo TFM. The context, however, suggests that NAFTA Rail #2 will indeed acquire all of TMM Multimodal's 38.5% interest.

¹⁴ Applicants indicate that the contingencies mainly involve a value added tax dispute in Mexico. See KCS-3 at 54.

¹⁵ Although § 11323(a)(5) ("Acquisition of control of a rail carrier [TFM] by a person
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The KCS/TM Transaction: Public Interest Considerations. Applicants contend that bringing the KCSR/GWER and Tex Mex systems under common control represents one more step in KCS's efforts to develop a "NAFTA Railroad" that will connect Canada, the U.S., and Mexico and provide seamless, efficient, and competitive rail service in all of North America.¹⁶ Common control of KCSR/GWER and Tex Mex, applicants argue, will provide more efficient routing and service options to shippers; it will make possible better coordination of marketing, improved customer service, and improved single-line service; it will allow KCSR/GWER and Tex Mex to reduce expenses and rationalize operations; it will make possible full integration of KCS's Management Control System (MCS),¹⁷ improved freight car utilization, improved performance of the locomotive fleet, reduced time-keeping and payroll-processing costs, and consolidation of general and administrative functions; it will provide financial stability to Tex Mex, which (applicants note) has from time to time in recent years found itself hard pressed to keep pace with the increasing traffic volumes available; and, finally, it will help position KCSR to remain a competitive, independent, and viable carrier. Applicants argue that the combined KCSR/GWER-Tex Mex system will be stronger, financially and operationally, than either system could be separately. Applicants assert that they will be in a better position to provide an effective competitive alternative at Laredo, and better able to compete with other railroads, motor carriers, and barges in providing effective and efficient service to the shipping public.¹⁸

¹⁵(...continued)

that is not a rail carrier [KCS] but that controls any number of rail carriers [KCSR and GWER, and, after the termination of the voting trust, Tex Mex]”) might suggest the applicability of this provision to acquisition of control of TFM by KCS, this provision is not applicable in this context because the Board has no jurisdiction over the acquisition of control of a rail carrier — like TFM — that is located entirely outside the United States. Similarly, although § 11323(a)(4) (“Acquisition of control of at least 2 rail carriers [KCSR, GWER, and, after the termination of the voting trust, Tex Mex] by a person that is not a rail carrier [Grupo TMM]”) might conceivably be applicable to the acquisition of a 20% (or 22%) interest in KCS by Grupo TMM, it has long been understood that acquisition of control by a noncarrier of any number of carriers operating as a “single established system” is not subject to § 11323(a)(4). Fox Valley & Western Ltd. — Exempt., Acq. and Oper., 9 I.C.C.2d 209, 217-18 (1992) (citing cases).

¹⁶ The North American Free Trade Agreement is referred to as NAFTA.

¹⁷ MCS is a computerized shipment and billing management system.

¹⁸ Applicants anticipate that, as a result of common control of KCSR/GWER and Tex Mex, approximately 6,313 carloads of traffic will be diverted to the combined KCSR/GWER-Tex Mex system annually (by the end of the third year following the

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Applicants further contend that common control of KCSR/GWER and Tex Mex will not result in any loss of competitive rail options for any shipper or any receiver. There are, applicants argue, no shippers or receivers receiving rail service from KCSR/GWER and Tex Mex for which common control would reduce the number of independent railroads serving them from three to two or from two to one. Applicants advise that KCSR/GWER and Tex Mex share only one common connection (at Beaumont, TX). The KCS/TM transaction, applicants maintain, involves an end-to-end connection whereby two carriers that already share common ownership and operating practices will finally be combined under a unified management team. Applicants contend that common control of KCSR/GWER and Tex Mex will not result in a substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States. And, applicants add, in view of the fact that the KCS/TM transaction occurs in a market in which motor carriers are the dominant mode of transportation, this transaction cannot have an adverse impact on competition.¹⁹

Applicants also contend that the KCS/TM transaction is not anticompetitive because it does not call for cancellation of any cooperative agreements with other carriers. These agreements include a 1997 NS-KCSR-Tex Mex marketing agreement (renewed in 2000 for 3 years) for traffic moving into Texas and Mexico, the KCSR-CN/IC Alliance,²⁰ and a 2002 BNSF-KCSR marketing agreement. Applicants add that these agreements provide valuable carloads to the KCSR and Tex Mex systems and form the backbone of the competitive alternative currently provided by KCSR and Tex Mex for NAFTA traffic. They further contend that, because of these agreements, shippers have a choice and do not have to depend solely upon UP or the trucking industry for shipment of their NAFTA traffic. Applicants state that, to improve Tex Mex's financial stability, KCSR intends to work with all of its connecting carriers

¹⁸(...continued)

consummation of common control), generating additional annual revenues of approximately \$14.3 million. Applicants predict that much of the diverted traffic will be interchanged with eastern carriers CSX Transportation, Inc. and Norfolk Southern Railway Company (NS). See KCS-3 at 221. Applicants further anticipate that common control will result in net operating-expense savings of approximately \$3.3 million annually.

¹⁹ Applicants also maintain that KCSR/GWER-Tex Mex common control will not adversely impact the essential services provided by any rail carrier. Applicants estimate that common control will result in losses of 4,123 cars a year to UP (allegedly representing 1.7% of all cars delivered or picked up by UP at Laredo, TX) and 1,692 cars a year to BNSF (allegedly representing 17% of all cars delivered or picked up by BNSF at Brownsville, TX). See KCS-3 at 122.

²⁰ Canadian National Railway Company is referred to as CN. Illinois Central Railroad Company is referred to as IC.

to increase the amount of traffic flowing over Tex Mex. Applicants acknowledge that, although they will honor all Tex Mex agreements pursuant to the terms, any agreement that does not provide adequate revenues will be reviewed, and, upon expiration, will be renegotiated or not renewed. See KCS-3 at 60 n.3.

Labor Protection. Applicants acknowledge that the applicable level of labor protection for the proposed KCS/TM transaction is that set forth in New York Dock Ry. — Control — Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979). Applicants state that the existing collective bargaining agreements for KCSR and Tex Mex will remain in force. They explain that the implementation of KCSR's MCS on Tex Mex will result in the elimination of a limited number of employee positions and that other anticipated operating economies will result in the elimination of a limited number of positions in marketing management, time-keeping and payroll processing, and a limited number of positions involved with car and locomotive pool. The applicants further acknowledge the possibility that significant changes may occur as they gain experience in the course of implementing common control of KCS and TM. See KCS-3 at 158.

KCS/TM APPLICATION ACCEPTED. The Board agrees with applicants that the KCS/TM common control transaction may be considered as a “minor transaction” under 49 CFR 1180.2(c), and the Board accepts the KCS/TM application for consideration because it is in substantial compliance with the applicable regulations governing minor transactions. See 49 U.S.C. 11321-26; 49 CFR part 1180.²¹

But while the KCS/TM transaction may be designated as “minor” from a regulatory standpoint, the broader transaction, incorporating the related KCS/TFM component, could be very significant. Indeed, if the KCS/TFM transaction were subject to the jurisdiction of the Board — which it is not — it would be categorized as a “major” transaction because TFM's size would make it a Class I railroad if it were in the U.S. Moreover, the significance of the role played by TFM in the U.S.-Mexico NAFTA corridor cannot be ignored.

Thus, UP has asked that applicants nevertheless be required to supplement their application to address the implications of the KCS/TFM transaction on the KCS/TM transaction (UP-1 pleading, filed May 27, 2003).²² UP expressed concern that TFM will not remain an independent and neutral connection at Laredo. UP argues that the KCS/TFM transaction must be

²¹ The Board reserves the right to require the filing of supplemental information from applicants or any other party or individual, if necessary to complete the record in this matter.

²² UP's request that applicants be required to supplement the KCS/TM application has been endorsed by E.I. du Pont de Nemours and Company (DuPont) in a pleading filed June 2, 2003. BNSF has also requested supplementation. See BNSF-1 (filed June 3, 2003) at 2-10.

evaluated on a record that includes the effect of the KCS/TFM transaction on the KCS/TM transaction and on competition within the U.S.

Notwithstanding that the two transactions nominally are separate and independent of each other, in reality they are two components of a single, larger transaction with broader potential implications in the U.S. Thus, as UP has pointed out, the Board should be prepared to address these effects. Accordingly, the Board will require that, by **June 23, 2003**, applicants must supplement the KCS/TM application to reflect the implications of the broader transaction for competition within the U.S. In particular, applicants should submit the information specified in 49 CFR 1180.1(k)(1) and 1180.11. Because the applicants likely have already prepared much, if not all, of this information for other purposes or after receiving UP's filing, they should be able to submit the necessary supplemental information by that date.²³

PUBLIC INSPECTION. The KCS/TM application is available for inspection in the Docket File Reading Room (Room 755) at the offices of the Surface Transportation Board, 1925 K Street, N.W., in Washington, D.C. In addition, it may be obtained from applicants' representatives (Mr. Mullins, for KCS, KCSR, and GWER; Mr. Streeter, for Tex Mex and Mexrail) at the addresses indicated above.

PROCEDURAL SCHEDULE. Applicants have indicated that they would like to release Tex Mex from the voting trust as soon as possible. They have therefore proposed a 128-day procedural schedule that provides for issuance of a decision by the Board on September 19, 2003, with an effective date of September 24, 2003.²⁴

²³ Should applicants need additional time to prepare the necessary supplemental information, they may request appropriate revisions to this schedule.

²⁴ Applicants contend that, because Tex Mex is now operating under a voting trust arrangement, the KCS/TM application should be approved and made effective on as expeditious a schedule as is possible.

The Board is adopting a 156-day procedural schedule²⁵ that, although 28 days longer than applicants suggest, still provides for less total time than the 180-day procedural schedule (30 days + 105 days + 45 days) established by the deadlines set forth at 49 U.S.C. 11325(a), (d)(2).²⁶ Applicants' suggested procedural schedule for this transaction would be shorter than others of its scope. The schedule announced today is consistent with the schedule for similar prior transactions. Applicants must submit their Environmental Appendix and Safety Integration Plan (SIP) to the Board, and supplement the KCS/TM application to reflect the implications, for KCS/TM common control, of KCS/TFM common control, by **June 23, 2003**. Any person who wishes to participate in this proceeding as a party of record (POR) must file, no later than **June 27, 2003**, a notice of intent to participate. Applicants must distribute their Environmental Appendix and SIP to parties of record and other designated entities, and must initiate publication of newspaper notices, by **July 1, 2003**. A public hearing will be held in **July 2003** (the precise date and the location will be announced later). All comments on applicants' Environmental Appendix and SIP must be filed by **July 31, 2003**. Comments, protests, requests for conditions, and any other evidence and argument in opposition to the KCS/TM application, including filings by the U.S. Department of Justice (DOJ) and the U.S. Department of Transportation (DOT), must be filed by **August 4, 2003**.²⁷ Responses to

²⁵ The schedule adopted here is similar, in key respects, to the schedule proposed by UP (in its UP-1 pleading, filed May 27, 2003), which is endorsed by DuPont (in its pleading filed June 2, 2003). Likewise, the schedule is also similar to that proposed by The National Industrial Transportation League (in its NITL-2 pleading, filed June 3, 2003). The adopted schedule should afford all non-applicant parties sufficient time to seek discovery regarding all relevant impacts of the Tex Mex transaction and to prepare and submit comments on the impacts of the transactions as requested by CN (in its CN-2 pleading, filed June 3, 2003). The Board realizes that, although the adopted schedule does not give non-applicant parties the 45 days one of them seeks for filing comments after the applicants' submission of supplemental information (see BNSF-1 at 13, filed June 3, 2003), in affording them 42 days, it has essentially accommodated that request.

²⁶ The Board expects that applicants have adhered to their promise to provide copies of the KCS/TM application to certain parties that had previously requested copies of the application and to all parties required by regulation. The Board further expects that applicants have also adhered (and will continue to adhere) to their promise to provide, promptly upon request, copies of the KCS/TM application to any other party. The Board understands that applicants' promises rest on the assumption that the parties requesting the KCS/TM application have complied with the protective order granted in Decision No. 1 (served May 13, 2003). See applicants' procedural schedule petition at 6 n.3.

²⁷ DOT, in its DOT-1 pleading (filed June 2, 2003), has asked that the procedural schedule be modified to accommodate its past practice of filing comments not only in response to
(continued...)

comments, protests, requests for conditions, and other opposition, responses to comments of DOJ and DOT, and rebuttal in support of the KCS/TM application must be filed by **September 2, 2003**. The Board's decision will be issued on **October 17, 2003** (the 156th day after the date on which the KCS/TM application was filed, and the 45th day after the close of the record). If, however, it is determined that an Environmental Assessment or Environmental Impact Statement is required, the procedural schedule will be adjusted as necessary. Also, if an oral argument is held, the Board's decision will be issued no later than the 45th day after the date on which the oral argument is held.²⁸

NOTICE OF INTENT TO PARTICIPATE. Any person who wishes to participate in this proceeding as a POR must file with the Board, no later than **June 27, 2003**, an original and 25 copies of a notice of intent to participate, accompanied by a certificate of service indicating that the notice has been properly served on the Secretary of the United States Department of Transportation, the Attorney General of the United States, and applicants' representatives. In addition, as previously noted, parties must submit one electronic copy of each document filed with the Board. Further details respecting such electronic submissions are provided below.

The Board will serve, as soon as practicable, a notice containing the official service list (the service list notice). Each POR will be required to serve upon all other PORs, within 10 days of the service date of the service list notice, copies of all filings previously submitted by that party (to the extent such filings have not previously been served upon such other parties). Each POR also will be required to file with the Board, within 10 days of the service date of the service list notice, an original plus 10 copies of a certificate of service, along with an electronic copy, indicating that the service required by the preceding sentence has been accomplished. Every filing made by a POR after the service date of the service list notice must have its own certificate of service indicating that all PORs on the service list have been served with a copy of the filing. Members of the United States Congress (MOCs) and Governors (GOVs) are not parties of record (PORs), and therefore, need not be served with copies of filings, unless any such Member or Governor has requested to be, and is designated as, a POR.

²⁷(...continued)

the application itself but also in response to the comments filed by other parties. As in past proceedings, DOT will be allowed to file its comments in response to other parties' comments on the reply due date (here, September 2, 2003). Applicants will be allowed to late-file (as quickly as possible) a reply to DOT's responsive comments. In this manner, the procedural schedule will not be extended unnecessarily.

²⁸ If the Board ultimately approves the KCS/TM application, consideration will be given to applicants' request that the decision take effect on the 5th day (and not, as is customary, the 30th day) after the date of service.

The Board will serve copies of its decisions, orders, and notices only on those persons who are designated on the official service list as either POR, MOC, or GOV. All other interested persons are encouraged to make advance arrangements with the Board's copy contractor, Dā 2 Dā Legal Copy Service, to receive copies of Board decisions, orders, and notices served in this proceeding. Dā 2 Dā Legal Copy Service will handle the collection of charges and the mailing and/or faxing of decisions, orders, and notices to persons who request this service. The telephone number for Dā 2 Dā Legal Copy Service is (202) 293-7776.²⁹

PUBLIC HEARING. A hearing at which members of the public may voice their views regarding the KCS/TM transaction will be held in **July 2003**. The precise date and location of the public hearing will be announced later. A public hearing is somewhat informal and the views expressed are not expected to be "legal" arguments. On the other hand, an oral argument is more formal and the lawyers representing the parties in a proceeding are expected to express "legal" views regarding any matters that are in dispute. It is possible that an oral argument may be held in this proceeding at a later date.

COMMENTS, PROTESTS, REQUESTS FOR CONDITIONS, AND OTHER OPPOSITION EVIDENCE AND ARGUMENT, INCLUDING FILINGS BY DOJ AND DOT. All comments, protests, requests for conditions, and any other evidence and argument in opposition to the KCS/TM application, including filings by DOJ and DOT, must be filed by **August 4, 2003**.

Parties (including DOJ and DOT) filing such comments, etc., must submit an original and 25 copies thereof. Each such submission: must be filed with the Surface Transportation Board, 1925 K Street, N.W., Washington, DC 20423-0001; must refer to STB Finance Docket No. 34342; and must be clearly labeled with an identification acronym and number (e.g., the KCS/TM application was labeled "KCS-3"), see 49 CFR 1180.4(a)(2). In addition, as previously noted, parties must submit one electronic copy of each document filed with the Board. Further details respecting such electronic submissions are provided below.

²⁹ An interested person does not need to be on the service list to obtain a copy of the KCS/TM application or any other filing made in this proceeding. The Board's Railroad Consolidation Procedures provide: "Any document filed with the Board (including applications, pleadings, etc.) shall be promptly furnished to interested persons on request, unless subject to a protective order." 49 CFR 1180.4(a)(3). The KCS/TM application and other filings in this proceeding will also be available on the Board's website at "www.stb.dot.gov" under "Filings." Furthermore, Dā 2 Dā Legal Copy Service will provide, for a charge, copies of the KCS/TM application or any other filing made in this proceeding, except to the extent any such filing is subject to the protective order previously entered in this proceeding.

Comments, etc., must be concurrently served by first class mail on the U.S. Attorney General and the U.S. Secretary of Transportation, applicants' representatives, and all other PORs, and should include the docket number and title of the proceeding, and the name, address, and telephone number of the commenting party and its representative upon whom service shall be made.

Because the KCS/TM common control transaction proposed in the KCS/TM application has been determined to be a minor transaction, no responsive applications will be permitted. See 49 CFR 1180.4(d)(1).

Protesting parties are advised that, if they seek either the denial of the KCS/TM application or the imposition of conditions upon any approval, on the theory that approval (or approval without imposition of conditions) will harm competition and/or their ability to provide essential services, they must present substantial evidence in support of their positions. See Lamoille Valley R.R. Co. v. ICC, 711 F.2d 295 (D.C. Cir. 1983).

RESPONSES TO COMMENTS, PROTESTS, REQUESTS FOR CONDITIONS, AND OTHER OPPOSITION, INCLUDING DOJ AND DOT; REBUTTAL IN SUPPORT OF KCS/TM APPLICATION. Responses to comments, protests, requests for conditions, and other opposition submissions, responses to comments of DOJ and DOT, and rebuttal in support of the KCS/TM application must be filed by **September 2, 2003**.

ENVIRONMENTAL MATTERS. Applicants assert in their application that the proposed KCS/TM transaction will have insignificant environmental effects and therefore does not require a formal environmental review under the National Environmental Policy Act of 1969 (NEPA). Applicants state that the transaction will not result in changes in carrier operations that would exceed the thresholds triggering environmental review established in the Board's environmental rules at 49 CFR 1105.7(e)(4) or (5).³⁰ Applicants further state that, under 49 CFR 1105.8(b)(1) and (3), the transaction is exempt from historic preservation reporting requirements because rail operations will continue after consummation of common control, further Board approval would be required to abandon any service, and there are no plans to dispose of or alter properties subject to Board jurisdiction that are 50 years old or older. Finally,

³⁰ Applicants explain that KCS/TM common control will generate less than a 1% increase in KCSR traffic and less than a 7% increase in Tex Mex traffic. Applicants add that, although there are significant rehabilitation and improvement plans that will take place on Tex Mex property if KCS obtains control authority, such improvements do not require Board approval or environmental review under NEPA. See KCS-3 at 41.

applicants explain that the transaction is subject to a “categorical exclusion” from environmental analysis under NEPA and the Board’s environmental rules.³¹

The information set forth in the application is sufficient to create a presumption that this transaction is covered by a categorical exclusion. However, the Board’s Section of Environmental Analysis (SEA) must independently determine whether applicants’ transaction is appropriately exempt from NEPA. To assist SEA in determining whether formal environmental review of the transaction is necessary, the Board has directed applicants to prepare an Environmental Appendix providing additional details and explanation, including maps, supporting applicants’ conclusion that this transaction does not warrant environmental documentation. Applicants shall submit the Environmental Appendix to SEA by **June 23, 2003**.

Applicants also have been working with the Federal Railroad Administration (FRA) to develop a Safety Integration Plan (SIP), pursuant to the joint regulations adopted by FRA and the Board to ensure adequate and coordinated consideration of safety integration issues by both the Board and FRA. See 49 CFR Parts 244 and 1106. The SIP will specifically address the process of safely combining applicants’ systems, if the proposed transaction is approved. Applicants shall submit their SIP to SEA by **June 23, 2003**.

To facilitate public review and comment on all aspects of the Environmental Appendix and the SIP, applicants must, by **July 1, 2003**, distribute the Environmental Appendix and the SIP to all parties of record and to appropriate agencies (consisting of the regional offices of the U.S. Environmental Protection Agency and the Governor’s Office and state equivalent of EPA in each state in which KCS owns track). Applicants must also, by **July 1, 2003**, publish a notice in major newspapers in communities between Beaumont, TX, and Laredo, TX, with populations more than 5,000 people, alerting the public that the Environmental Appendix and SIP are available and explaining how to obtain copies and submit comments. Interested parties will have 30 days — until **July 31, 2003** — to submit comments on the Environmental Appendix and the

³¹ Under the regulations of the President’s Council on Environmental Quality implementing NEPA and the Board’s environmental regulations, actions are separated into three classes that prescribe the level of documentation required in the NEPA process. Actions that may significantly affect the environment generally require the agency to prepare a full Environmental Impact Statement (EIS). 40 CFR 1501.4(a)(1); 49 CFR 1105.4(f), 1105.6(a). Actions that may or may not have a significant environmental impact ordinarily require the agency to prepare a more limited Environmental Assessment (EA). 40 CFR 1501.4(c); 49 CFR 1105.4(d), 1105.6(b). Finally, actions whose environmental effects are ordinarily insignificant may be excluded from NEPA review across the board, without a case-by-case review. Such activities are said to be covered by a categorical exclusion. 40 CFR 1500.4(p), 1501.4(a)(2), 1508.4; 49 CFR 1105.6(c).

SIP to SEA. Applicants shall certify that they have met these distribution and newspaper notice requirements. The Board will further ensure broad access to the Environmental Appendix and the SIP by making them available on the Board's website at "www.stb.dot.gov."

As discussed above, the information provided by applicants is sufficient to create a presumption that this action does not require formal environmental review. Accordingly, comments challenging the presumption that this matter is categorically excluded from NEPA must demonstrate with specificity why an EA or EIS appears to be warranted in this case.

Based on its consideration of all timely comments and its own independent review of all available environmental information, including the SIP, SEA will then recommend to the Board whether there is a need for formal environmental review in this case. The Board will then determine whether this transaction is categorically excluded from NEPA or, alternatively, whether an EA or an EIS should be prepared. If it appears that an EA or an EIS is required to meet the Board's obligations under NEPA, the procedural schedule set forth in this decision will be adjusted accordingly. Even if no EA or EIS is warranted, the Board intends to include in any decision approving the KCS/TM transaction a condition requiring applicants to comply with their SIP. See 49 CFR 1106.4(b)(4).

DISCOVERY. Discovery may begin immediately. The parties are encouraged to resolve all discovery matters expeditiously and amicably.

ELECTRONIC SUBMISSIONS: IN GENERAL. As already mentioned, in addition to submitting an original and 25 paper copies of each document filed with the Board, parties must submit, on 3.5-inch IBM-compatible floppy diskettes (disks) or on compact discs (CDs), copies of all textual materials, electronic workpapers, data bases, and spreadsheets used to develop quantitative evidence.³² Textual materials must be in, or compatible with, WordPerfect 10.0. Electronic spreadsheets must be in, or compatible with, Lotus 1-2-3 Release 9 or Microsoft Excel 2002. Each disk or CD should be clearly labeled with the identification acronym and number of the corresponding paper document, see 49 CFR 1180.4(a)(2), and a copy of such disk or CD should be provided to any other party upon request. Also, each disk or CD should be clearly labeled as containing confidential or redacted materials. The data contained on the disks and CDs submitted to the Board will be subject to the protective order granted in Decision No. 1 (served May 13, 2003), and will be for the exclusive use of Board employees

³² Parties unable to comply with the electronic submission requirement can seek a waiver from the Board.

reviewing substantive and/or procedural matters in this proceeding. The flexibility provided by computer data will facilitate timely review by the Board and its staff.³³

ELECTRONIC SUBMISSIONS: WORKPAPERS, DATA BASES, AND SPREADSHEETS. In the past, the Board has encountered problems with the “links” in spreadsheets functioning properly when the spreadsheets are installed on desktop computers or network servers. To avoid such problems, parties submitting electronic workpapers, data bases, and/or spreadsheets should use naming and linking conventions that will permit the spreadsheets to operate on the Board’s computers.³⁴ Electronic data bases should be compatible with the Microsoft Open Database Connectivity (ODBC) standard.³⁵ The Board currently uses Microsoft Access 2000, and data bases submitted should be either in this format or another ODBC-compatible format. Otherwise, submitters should explain why it is not possible to submit the data base in this format and seek a determination as to whether it is feasible for the Board to accept the data base in another format.

EXCESSIVE USE OF CONFIDENTIALITY DESIGNATIONS. Applicants have included, in their KCS-3 application, copies of the KCS/TM Stock Purchase Agreement and the KCS/TM Voting Trust Agreement. See KCS-3 at 160-91 and 192-209, respectively. Initially, however, neither agreement was included in the “Public Version” of the KCS-3 application because, initially, each agreement was designated “Highly Confidential” in its entirety.³⁶ Subsequently, applicants filed a “Public Version” of the KCS/TM Stock Purchase Agreement,

³³ The electronic submission requirements set forth in this decision supersede, for the purposes of this proceeding, the otherwise applicable electronic submission requirements set forth in the Board’s regulations.

³⁴ The Board will not specify a particular naming and linking convention. It is incumbent upon the submitter to use generic naming and linking conventions that will permit the spreadsheets to operate on desktop computers or from a network server. Questions concerning naming and linking matters and/or compatibility with the Board’s computers can be addressed to William H. Washburn, Office of Economics, Environmental Analysis, and Administration, at (202) 565-1550.

³⁵ ODBC is a Windows technology that allows a data base software package, such as Microsoft Access, to import data from a data base created using a different software package. All data bases must be supported with adequate documentation on data attributes, SQL queries, programmed reports, etc.

³⁶ Although there is one indication in the KCS-3 application that the KCS/TM Stock Purchase Agreement was designated “Confidential,” see KCS-3 at 34, it seems more likely that this agreement was actually designated “Highly Confidential,” see KCS-3 at 160.

see the KCS submission dated May 29, 2003, but they have not filed a “Public Version” of the KCS/TM Voting Trust Agreement. As respects the KCS/TM Voting Trust Agreement, the continuing use of the “Highly Confidential” designation provided for in the protective order granted in Decision No. 1 appears to be excessive. There may, perhaps, be bits and pieces of the KCS/TM Voting Trust Agreement that should be protected under either the “Confidential” designation or the “Highly Confidential” designation. It is highly unlikely, however, that this agreement in its entirety merits such protection. Applicants will therefore be required to file, no later than **June 20, 2003**, either a redacted version of the KCS/TM Voting Trust Agreement or a persuasive explanation of why it is that this agreement requires protection in its entirety under either the “Confidential” designation or the “Highly Confidential” designation.³⁷

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The KCS/TM application in STB Finance Docket No. 34342 is accepted for consideration.
2. The parties to this proceeding must comply with the Procedural Schedule adopted by the Board in this proceeding as shown in Appendix A.
3. The parties to this proceeding must comply with the procedural requirements described in this decision.
4. Applicants must file, no later than June 20, 2003, either a redacted version of the KCS/TM Voting Trust Agreement or a persuasive explanation of why this agreement requires protection in its entirety under either the “Confidential” designation or the “Highly Confidential” designation.³⁸

³⁷ If applicants choose to file an explanation in lieu of a redacted version, the explanation, if applicants think it appropriate, may be designated either “Confidential” or “Highly Confidential.”

³⁸ As respects the KCS/TM Stock Purchase Agreement, applicants should also file a redacted version of the items referred to as Annex I and Annex II, see KCS-3 at 163 (these items, although noted in the Table of Contents, do not appear to have been included in either the “Highly Confidential” version or the “Public” version of the KCS/TM Stock Purchase Agreement). If, however, applicants believe that these items should be treated as either

(continued...)

5. This decision is effective on June 13, 2003.

Decided: June 9, 2003.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary

³⁸(...continued)

“Confidential” or “Highly Confidential,” applicants may submit these items under seal.

APPENDIX A: PROCEDURAL SCHEDULE

May 14, 2003	KCS/TM application and petition to establish procedural schedule filed.
June 13, 2003	Board notice of acceptance of the KCS/TM application published in the <u>Federal Register</u> .
June 23, 2003	Environmental Appendix and Safety Integration Plan (SIP) due. Supplementation of the KCS/TM application to reflect the implications of KCS/TFM common control on the KCS/TM transaction and on competition within the U.S. due.
June 27, 2003	Notices of intent to participate due.
July 1, 2003	Applicants distribute Environmental Appendix and SIP to parties of record and other designated entities, and initiate publication of newspaper notices.
July 2003	Public hearing to be scheduled; date and location to be announced.
July 31, 2003	Comments on Environmental Appendix and SIP due.
August 4, 2003	All comments, protests, requests for conditions, and any other evidence and argument in opposition to the KCS/TM application, including filings of the U.S. Department of Justice (DOJ) and the U.S. Department of Transportation (DOT), due.
September 2, 2003	Responses to comments, protests, requests for conditions, and other opposition due. Responses to comments of DOJ and DOT due. Rebuttal in support of KCS/TM application due.
October 17, 2003	Date of service of final decision (if no environmental review is required and no oral argument is held).